Supreme Court, U.S.
FILED
MAR 31 1998
OFFICE OF THE CLERK

No. 97-1418

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,
Successor by merger to Bank of America Illinois,

Petitioner,

v.

203 NORTH LASALLE STREET PARTNERSHIP,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONSE IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

RICHARD M. BENDIX, JR.
Counsel of Record
MALCOLM M. GAYNOR
PAUL J. GAYNOR
SCHWARTZ, COOPER, GREENBERGER & KRAUSS, CHARTERED
180 North LaSalle Street
Suite 2700
Chicago, Illinois 60601
(312) 346-1300

Attorneys for Respondent

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

38 pp

RULE 14.1(b) AND 29.6 STATEMENT

The Respondent, 203 North LaSalle Street Partnership, is an Illinois Limited Partnership. The Respondent has no parent corporation, subsidiaries or affiliates, and no stock in the Respondent is publicly traded.

TABLE OF CONTENTS

PAGE

RULE 14.1(b) AND 29.6 STATEMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 7

I. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR CONSIDERING SURVIVAL OF THE NEW VALUE COROLLARY 9

A. Reversing the lower courts would make this the first case in which an unstayed order confirming a substantially consummated plan of reorganization was overturned 9

B. By failing to appeal the bankruptcy court's order denying the Bank's motion to terminate the Debtor's exclusive right to file a plan, the Bank waived its right to raise exclusivity 15

C. The Plan does not violate the absolute priority rule 17

D. Even if the absolute priority rule applies, this case does not present any of the hypothetical dangers upon which critics rely to question the survival of the new value corollary ... 20

II. THERE IS NO SPLIT IN THE CIRCUITS REGARDING THE EXISTENCE OF THE NEW VALUE COROLLARY 25

III. THE STATUS OF THE NEW VALUE COROLLARY IS NO LONGER SUFFICIENTLY IMPORTANT TO REQUIRE DECISION BY THIS COURT 27

CONCLUSION 30

TABLE OF AUTHORITIES

CASES — PAGE(S)

Alsberg v. Robinson, 68 F.3d 312 (9th Cir. 1995) 25

In re Bonner Mall Partnership, 2 F.3d 899 (9th Cir. 1993) . . 8, 12, 13, 25, 29, 30

In re Bryson Properties XVIII, 961 F.2d 496 (4th Cir. 1991) . 8, 19, 22, 25, 26, 27

In re Burton Securities, S.A., 202 B.R. 411 (S.D. Tex. 1996) 13

In re Cambridge Biotech Corp., 214 B.R. 429 (D. Mass. 1997) 13

Case v. Los Angeles Lumber Products Co., 308 U.S. 108 (1939) 18, 19

Central States, Southeast and Southwest Areas Pension Funds v. Central Transport, Inc., 841 F.2d 92 (4th Cir. 1988) 13, 14

Church of Scientology v. United States, 506 U.S. 9 (1992) 9

Coltex Loop Central Three Partners, L.P. v. BT/SAP Pool C Associates, No. 96-5140, slip op. (2d Cir. Feb. 19, 1998) 8, 19, 22, 23, 24, 25, 26, 27

In re Continental Airlines, 91 F.3d 553 (3d Cir. 1996) (en banc) *cert. denied* 117 S. Ct. 686, 136 L.Ed. 2d 610 (1997) 12, 13

Dewsnup v. Timm, 502 U.S. 410 (1992) 25

In re Freeman, 956 F.2d 252 (11th Cir. 1992) 16

In re Greystone III Joint Venture, 995 F.2d 1274 (5th Cir. 1991) 25

Group of Institutional Investors v. Chicago, M.StP.&Pac.R.R. 318 U.S. 523 (1943) 18

Kansas City Terminal R. Co. v. Central Union Trust Co., 271 U.S. 445 (1926) 18, 22

Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351 (7th Cir. 1990) 24

Matter of Manges, 29 F.3d 1034 (5th Cir. 1994), *cert. denied* 513 U.S. 1152 (1995) 13

Mills v. Green, 159 U.S. 651 (1895) 9

NLRB v. Bildisco and Bildisco, 465 U.S. 513 (1984) 15

Northern P. Ry. Co. v. Boyd, 228 U.S. 482 (1913) 19, 20

Norwest Bank Worthington v. Ahlers, 485 U.S. 197 (1988) 28, 29

In re Pine Mountain Ltd., 80 B.R. 171 (9th Cir. BAP 1987) 16, 17

In re Public Service Company of New Hampshire, 963 F.2d 469 (1st Cir. 1992), *cert. denied* 506 U.S. 908 (1992) 13

Randall v. Loftsgaarden, 478 U.S. 647 (1986) 19

Matter of Snyder, 967 F.2d 1126 (7th Cir. 1992) 17, 24

In re Texaco, 92 B.R. 38 (S.D.N.Y. 1988) 13

Matter of 203 North LaSalle Street Partnership, 190 B.R. 595 (N.D. Ill. 1995) 14

In re UNR Industries, Inc., 20 F.3d 766 (7th Cir. 1994), *cert. denied* 513 U.S. 999 ..... 9, 11, 12

U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994) 12

In re Wabash Valley Power Association, 72 F.3d 1305 (7th Cir. 1995), *cert. denied* 117 S.Ct. 389 (1996) 18

Matter of Woodbrook Associates, 19 F.3d 312 (7th Cir. 1994) 3, 24

STATUTES

11 U.S.C. § 221 (1938) (repealed 1978) 19

11 U.S.C. § 362(d)(2) 12

11 U.S.C. § 506(a) 2

11 U.S.C. § 1101 11

11 U.S.C. § 1111(b)(1)(A) 2, 23

11 U.S.C. § 1111(b)(2) 2

11 U.S.C. § 1121(b) 5, 16

11 U.S.C. § 1121(d) 16

11 U.S.C. § 1122 25

11 U.S.C. § 1129 26

11 U.S.C. § 1129(a)(7) 16

11 U.S.C. § 1129(b) 18, 19

11 U.S.C. § 1129(b)(2)(A)(i) 2, 3

11 U.S.C. § 1129(b)(2)(B)(ii) 2, 15, 16

11 U.S.C. § 1225(b) 29

12 U.S.C. § 29 1

26 U.S.C. § 469 28

26 U.S.C. §§ 1001, 7701(g) 28

Section 77B of the Bankruptcy Act of 1898 June 7, 1934, 48 Stat. at L. 912, Chap. 424 (repealed) 18, 19

OTHER AUTHORITIES

8 *Collier on Bankruptcy*, ¶1200.01[b] (15th ed. rev. 1997) 29

Baird, *The Elements of Bankruptcy* (rev. ed. 1993) 24

National Bankruptcy Review Commission Final Report, October 20, 1997 30

Warren, *A Theory of Absolute Priority*, *1991 Annual Survey of American Law* ... 21, 24

STATEMENT OF THE CASE

The plan of reorganization (the "Plan"), which has been in effect since December 6, 1995, gives the Bank all cash flow and all future appreciation from the reorganized debtor's ("Reorganized LaSalle") Class A office building (the "Property") until the Bank has received payment in full of its secured and unsecured claims, aggregating $93 million.[1] The Bank's opportunity to benefit from that future appreciation, which the Bank agrees will occur, is facilitated by a $6.125 million new capital contribution from certain of the former Debtor's partners ("Investors"). The Plan provides that the Investors can receive no return whatsoever on or of their investment until the Bank has been paid in full. The Investors made that new capital contribution to defer the tax liability they would have incurred if the Bank had foreclosed on its mortgage.[2] App. at 112a-113a.

The Bank's note was nonrecourse requiring the Bank, under nonbankruptcy law, to look only to the Property for payment. Therefore, in a foreclosure, the Bank would have received only the depressed value of the Property at the time of the foreclosure sale.[3] In a Chapter 7 liquidation, the Bank's deficiency claim would have been disallowed as unenforceable under applicable nonbank-

---

[1] The Plan preserves the Bank's deficiency claim in its entirety until that claim has been paid in full.

[2] The Plan eliminated the interests of non-contributing partners. Partners who did contribute new capital received equity interests in Reorganized LaSalle proportionate to their contributions.

[3] Federal banking law requires banks to dispose of saleable foreclosed properties within five years. 12 U.S.C. § 29

ruptcy law. App. at 128a. However, in this Chapter 11 case, pursuant to 11 U.S.C. § 1111(b)(1)(A), the Bank was entitled to be treated as if it had recourse against the Debtor. The Bank had a right, under 11 U.S.C. § 1111(b)(2), to retain a lien upon the Property for its full $93 million claim. But the Bank did not exercise that right. Accordingly, under 11 U.S.C. § 506(a), the Bank's claim was split into two claims: (a) a secured claim equal in amount to the value of the Property and (b) an artificially created unsecured claim for the balance of the Bank's debt. In order to determine the amount of the Bank's secured claim, the bankruptcy court was required to value the Property.

The Bank's $54.5 million secured claim was based on the bankruptcy court's valuation of the Property at $55.8 million, less the disposition costs which the Bank would have incurred if it had sold the Property after foreclosing on its mortgage. App. at 115a. There was no material difference between the Bank's and the bankruptcy court's valuation of the Property. The bankruptcy court's value for the Property was a mere 2.8% less than the value proposed by the Bank's appraiser. App. 108a, 111a.

General Electric Capital Corporation ("GE Capital"), in a letter of intent for refinancing the Property, offered to lend Reorganized LaSalle $54.5 million to pay the Bank's secured claim in cash, in full. App. at 125a-126a. The Bank refused to accept that cash payment, or any plan which would have permitted the Debtor to retain ownership of the Property. App. at 126a. Therefore, in order to confirm its Plan, the Debtor was required to "cram down" the Bank's claims by satisfying the requirements of 11 U.S.C. §§ 1129(b)(2)(A)(i) and 1129(b)(2)(B)(ii).

The Plan treated the Bank's secured claim more favorably than the treatment required by the marketplace as evidenced by GE Capital's letter of intent. Thus, although the Bank voted its secured claim to reject the Plan, the bankruptcy court found that the Plan's treatment of that claim satisfied the requirements of Section 1129(b)(2)(A)(i). App. at 172a.

As required by the Seventh Circuit's decision in *In the Matter of Woodbrook Associates*, 19 F.3d 312, 319 (7th Cir. 1994), the Plan placed the Bank's artificial deficiency claim in a class by itself, separate and apart from creditors holding recourse unsecured claims. Under the Plan, this artificial deficiency claim receives all proceeds from a sale or refinancing of the Property remaining after payment of the Bank's secured claim until that deficiency claim is paid in full. App. at 132a-133a. The bankruptcy court projected that a sale or refinancing of the Property on the tenth anniversary of plan confirmation would produce a $19 million distribution to the Bank on account of its deficiency claim, representing a 16% dividend on a present value basis. App. at 133a. If the Property is refinanced rather than sold on or before the tenth anniversary of confirmation of the Plan, the potential exists for the Bank to receive an even greater dividend when the Property is refinanced again or sold after the tenth anniversary of Plan confirmation.[4]

The Bank was not the only creditor in this case. The general partner of the Debtor and an affiliate held al-

---

[4] The Plan does not discharge the Bank's deficiency claim. Thus, if the first mortgage is paid through successive refinancings, the deficiency will continue to exist and the potential exists for the Bank to benefit from those refinancings until its deficiency claim is paid in full.

lowed unsecured claims totaling $7.7 million; the general partner held another claim based upon a $11.3 million second mortgage. App. 103a, 129a. Under the Plan, insiders waived all of these claims, even though the $7.7 million of unsecured claims held by the general partner and its affiliate would have received a distribution of approximately $3 million in a Chapter 7. App. at 129a-130a. Under the Plan, that money was reinvested in the Property. In addition, general unsecured trade debt of about $160,000 was paid in full pursuant to the Plan. App. at 103a, 132a.

Of the $6.125 million new capital contribution, $3 million was paid in cash on the day after confirmation; the balance was payable in installments of $625,000 on the first five anniversaries of plan confirmation. *Id.* The first two deferred payments totaling $1,250,000 have already been made. The remaining payments are partially secured by a letter of credit which, in turn, has been guaranteed by an affiliate of the general partner. App. at 123a. The amount and terms of the new capital contribution were more favorable to the Bank than the amount and terms required by the marketplace in the form of the GE Capital letter of intent. App. at 125a-126a, 127a n4. Unlike that letter of intent, which permitted a 9% annual return on (and a return of) new capital before any payment to the deficiency claim, the Plan fully subordinated the new capital contribution to the Bank's artificial deficiency claim. *Id.*, 135a. Indeed, the bankruptcy court found that the equity interests in Reorganized LaSalle have no value "on the market". App. 139a.

The Bank filed a motion in the bankruptcy court seeking to terminate the Debtor's exclusive right to file a

plan, a right conferred by 11 U.S.C. § 1121(b). The Bank also sought leave to file its own plan that called for liquidation of the Property, and made no provision either for contribution of new capital or for any payment to the $7.7 million of allowed unsecured claims held by insiders. The bankruptcy court denied the Bank's motion. **The Bank did not appeal that denial or raise that denial as an issue on appeal when the Debtor's Plan was confirmed.**

Following confirmation of the Plan, the Bank moved both in the bankruptcy court and in the district court for a stay pending appeal. The Bank refused to post a supersedeas bond. As a result, its motions for stay pending appeal were denied. Thereafter, Reorganized LaSalle implemented the Plan.

Specifically, as set forth in Debtor's Supplemental Status Report on Plan of Reorganization filed on December 27, 1995 (the "SSR"), *see Appellee's Memorandum In Support Of Motion To Dismiss*, filed in the Seventh Circuit February 5, 1996 at Ex. F, (a) certain partners in the Debtor contributed $3 million of cash and $3,125,000 of notes payable in five annual installments of $625,000 to Reorganized LaSalle as new equity capital (*Id.* at Ex. D at Wilkow Aff. ¶ 3) (two of the five annual installment payments have already been made); (b) the cash component of Reorganized LaSalle's new equity capital, together with $3.1 million of cash which the Debtor held before the Chapter 11 filing, was used to pay (i) $2,277,257.39 of delinquent real estate taxes, (ii) $1,149,500 to the Bank on account of its restructured first mortgage loan, (iii) a $266,975 commitment fee to the Bank, (iv) a $1,850,000 payment to Rudnick & Wolfe, a major tenant of the Property, in connection

with the seven-year extension of Rudnick & Wolfe's lease with Reorganized LaSalle, which lease extension was effective only if and when the Plan was confirmed, (v) a $400,000 commission to Equis, Rudnick & Wolfe's leasing broker, (vi) a $181,000 commission to M & J Wilkow Brokerage Services Corporation, the landlord's leasing broker, and (vii) $88,377.87, representing payment in full, to all 41 of the Debtor's non-insider unsecured trade creditors.

Pursuant to the Plan, Reorganized LaSalle has also: (a) delivered to the Bank all of the documents reflecting the restructuring of the Bank's first mortgage loan effected by the Plan, (b) rejected all of the Debtor's prepetition contracts with providers of goods and services to Reorganized LaSalle; (c) hired new on-site property management personnel; and (d) entered into new service agreements. *Id.* at Ex. F SSR; *Id.* at Ex. D Wilkow Aff. at ¶4. The partnership interests of those partners who did not contribute new equity capital to the Reorganized Debtor have been eliminated (*Id.* at Ex. A Plan §5.2 at 17) and resulting income tax consequences have been realized.

Relying upon the Confirmation Order and the resulting deferral of tax liability, several Investors chose not to structure the sale of other real estate owned by them as a tax free exchange.

REASONS FOR DENYING THE WRIT

The Bank's petition for a writ of certiorari (the "Petition") should be denied for the following reasons:

1. This case is not an appropriate vehicle for deciding whether the new value corollary to the absolute priority rule survived enactment of the Bankruptcy Code in 1978 because:

a) This case is equitably moot. The Bank failed to obtain a stay pending appeal following entry of the confirmation order. As a result, the Plan has been consummated. In reliance on the final order confirming the Plan, investors have contributed millions of dollars to the reorganized enterprise. Any attempt to unwind transactions that occurred nearly two and a half years after confirmation, would seriously jeopardize future Chapter 11 reorganizations by undermining investors' confidence in their ability to invest in reorganized companies in reliance on final unstayed bankruptcy court orders.

b) The Bank's primary criticism of the Plan is that it purportedly gave the Debtor's equity holders the "exclusive opportunity" to retain interests in the reorganized debtor. However, the Bank waived the issue of exclusivity by failing to raise it on appeal below.

c) The Plan does not violate the absolute priority rule. Investors did not receive any property which would have been available to satisfy creditors' claims.

d) The Plan does not involve any of the alleged dangers which have caused critics of the new value corollary to question its continued existence. Not only was the bankruptcy court's

> valuation of the Property consistent with the value attributed to the Property by the Bank's appraiser, but the new capital contribution exceeded the requirements of an independent lender in the marketplace. Significantly, the Bank does not claim that the Plan causes any of the putative harms which the Bank ascribes to the new value corollary.

2. There is no split in the Circuits regarding the existence of the new value corollary. The Seventh Circuit in this case and the Ninth Circuit in *In re Bonner Mall Partnership*, 2 F.3d 899 (9th Cir. 1993) have both held that the new value corollary survived enactment of the Bankruptcy Code in 1978. No circuit court has held to the contrary. Both the Second Circuit in *Coltex Loop Central Three Partners, L.P. v. BT/SAP Pool C Associates*, No. 96-5140, slip op. (2d Cir. Feb. 19, 1998) and the Fourth Circuit in *In re Bryson Properties XVIII*, 961 F.2d 496 (4th Cir. 1991) suggest that a debtor's equity holders may retain their interest in the reorganized debtor under certain circumstances. Such circumstances are present in this case. Neither *Coltex* nor *Bryson Properties* held that the new value corollary ceased to exist after enactment of the Bankruptcy Code.

3. The question of the new value corollary's survival is no longer sufficiently important to justify consideration by this Court. The issue has arisen primarily in single asset real estate and family farm Chapter 11 cases, which constituted a mere fraction of all Chapter 11 filings.

4. The Seventh Circuit's decision in this case was correct both as a matter of law and as a matter of bankruptcy policy.

I.

THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR CONSIDERING SURVIVAL OF THE NEW VALUE COROLLARY.

A. Reversing the lower courts would make this the first case in which an unstayed order confirming a substantially consummated plan of reorganization was overturned.

The Petition should be denied as equitably moot, even if the question presented merits this Court's attention.[5] This case should never have spawned any appellate decisions on the new value corollary, because the Bank's appeals from the unstayed Confirmation Order should have been dismissed as equitably moot. The district and circuit courts in this case improperly refused to dismiss the Bank's appeals to them as equitably moot. Affirming the bankruptcy court's entry of the Confirmation Order on the merits, the district and circuit courts theorized that, had they reversed the Confirmation Order, the bankruptcy court could have fashioned some form of relief which would not unduly burden innocent third parties. App. at 11a, 60a. Clearly, modification of the Plan would upset the legitimate expectations of the Investors, who were not parties to the appeal. Nevertheless, the Seventh Circuit brushed that fact aside because

---

[5] The doctrine of equitable mootness is separate and distinct from mootness under Article III of the Constitution. The latter doctrine requires dismissal of an appeal when circumstances make it *impossible* for a court to fashion any form of meaningful relief. *Church of Scientology v. United States*, 506 U.S. 9 (1992); *Mills v. Green*, 159 U.S. 651 (1895). When an appellant invokes equitable mootness, the reviewing court must consider whether it is "*prudent*" to upset a plan of reorganization long after confirmation. *In re UNR Industries, Inc.*, 20 F.3d 766, 769 (7th Cir. 1994), *cert. denied* 513 U.S. 999.

the Bank had consented to repay the investments plus reasonable interest. Repayment to the Investors is not what they legitimately expected when they made their investments in reliance upon the unstayed Confirmation Order. They purchased deferral of tax liabilities for an extended period.

The Seventh Circuit ignored the universal unwillingness of appellate courts to reverse unstayed confirmation orders. This Court should not compound the damage already done to the equitable mootness doctrine by the lower courts in this case by considering the merits, and should deny the Petition. If this Court wishes to examine the new value corollary, it should wait for a case arising from a confirmation that has been stayed, a case not burdened with the equitable mootness issue.

In order to protect legitimate reliance interests of participants in the Chapter 11 process, it is important that the Court deny this Petition seeking review of an *unstayed* confirmation order. The very consideration of this case on its merits will cast doubt on the finality of confirmation orders, even if this Court should ultimately affirm. No appellate court has ever found a reason in the facts of any reported case powerful enough to reverse an unstayed confirmation order. In this case, the Bank offered no reason whatsoever, and omitted any reference to the absence of a stay in its Statement of the Case. Any benefit to be obtained from considering this case on its merits, would be far outweighed by the harm which would flow from disregarding equitable mootness.

The Bank did not obtain a stay pending appeal, because it was unwilling to furnish a supersedeas bond and assume the attendant liability on such a bond in the event the bankruptcy court's confirmation order was

affirmed. Nevertheless, the Bank seeks to dismantle the plan of reorganization confirmed and consummated more than two years ago.[6] Reversal of the Confirmation Order at this late stage would completely repudiate the well-settled doctrine of equitable mootness and would undermine the confidence of investors, lenders and purchasers in the finality and reliability of confirmed reorganization plans.

Not only the risk of revision of a confirmed plan on appeal, but the mere pendency of an appeal itself, discourages business people from making substantial investments in reorganized debtors. The appellate process itself is expensive and sophisticated entrepreneurs will deduct the cost of appeals from the amount they are willing to pay for interests in reorganized debtors. Potential investors in a reorganized debtor will hold back their best offer unless they are certain that, absent a stay, the reorganized enterprise will operate free of judicial interference following confirmation of a reorganization plan.

Only if investors can confidently rely upon the finality of such orders will the substantial social and private value of reorganizations, referred to by the Seventh Circuit *In the Matter of UNR Industries, Inc.*, 20 F.3d

---

[6] 11 U.S.C. § 1101(2) defines substantial consummation as:

(A) transfer of all or substantially all of the property proposed by the plan to be transferred;

(B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and

(C) commencement of distribution under the plan.

766, 771 (7th Cir. 1994), *cert. denied* 513 U.S. 999 be fully realized.

In support of his conclusion that an appeal from an unstayed confirmation order in that case should be dismissed, Judge Easterbrook trenchantly[7] observed that:

> Every incremental risk of revision on appeal puts a cloud over the plan of reorganization and derivatively over the assets of the reorganized firm. People pay less for assets that may be snatched back or otherwise affected by subsequent events.
>
> . . . .
>
> By protecting the interest of persons who acquire assets in reliance on a plan of reorganization, a court increases the price the estate can realize *ex ante* and thus produces benefits for creditors in the aggregate.

Id. at 770.

The Bank notes that this Court granted certiorari to consider the existence of the new value corollary to the absolute priority rule in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994). However, that case did *not* involve an appeal from an unstayed order confirming a substantially consummated reorganization plan. Rather, that case involved an appeal from an order reversing a lower court order granting a secured creditor's motion for relief from the automatic stay under 11 U.S.C. § 362(d)(2). *In re Bonner Mall Partnership*, 2 F.3d 899 (9th Cir. 1993). Consequently, the equitable mootness doctrine was not implicated by this Court's grant of certiorari in *Bonner Mall*.

---

[7] *In re Continental Airlines*, 91 F.3d 553, 559 (3d Cir. 1996) (en banc) *cert. denied* 117 S. Ct. 686, 136 L.Ed. 2d 610 (1997) where the Third Circuit characterized Judge Easterbrook's opinion as "trenchant."

Under the equitable mootness doctrine, courts decline to consider the merits of appeals from confirmation orders when, as a result of substantial consummation of a reorganization plan, it is no longer prudent to grant relief. *Matter of Manges*, 29 F.3d 1034, 1039 (5th Cir. 1994), *cert. denied* 513 U.S. 1152 (1995). The equitable mootness doctrine promotes the "important public policy favoring orderly reorganization and settlement of the debtor's estate by 'affording finality to the judgments of the bankruptcy courts'."; *In re Public Service Company of New Hampshire*, 963 F.2d 469, 471-472 (1st Cir. 1992), *cert. denied* 506 U.S. 908 (1992), *quoting In re Texaco*, 92 B.R. 38, 45 (S.D.N.Y. 1988). *See also In re Continental Airlines*, *supra* at 560; *Central States, Southeast and Southwest Areas Pension Funds v. Central Transport, Inc.*, 841 F.2d 92, 95 (4th Cir. 1988); *In re Cambridge Biotech Corp.*, 214 B.R. 429, 431-432 (D. Mass. 1997) (under Section 1127(b) of the Code, court's power to modify a plan of reorganization extends only from confirmation to substantial consummation); *In re Burton Securities, S.A.*, 202 B.R. 411, 417 (S.D. Tex. 1996).

In *Central States*, *supra*, a dissident creditor who failed to post a su rsedeas bond sought complete reversal of a confir ed reorganization plan after new equity had been invested and used to pay claims. In dismissing the appeal as moot, the court stated as follows:

> We can understand a reluctance to put up a supersedeas bond of $7 million but if the [appellant] Pension Fund seriously sought an outright reversal of the order of confirmation, as it contends, it should have posted the bond or sought

> a substantial reduction in its amount; it should not have sat idly by while this case drifted along a routine, unexpedited course.

841 F.2d at 95. Just like the appellant in *Central States*, the Bank refused to post a supersedeas bond that would have stayed implementation of the Plan, and would have prevented investors from relying on the Confirmation Order to make their substantial infusion of new equity nearly two and one-half years ago.[8] Such a bond would also have preserved the status quo for appellate courts and prevented the comprehensive change in circumstances that has now occurred as a result of substantial consummation of the Plan. *See Matter of 203 North LaSalle Street Partnership*, 190 B.R. 595 (N.D. Ill. 1995). Having failed to preserve the status quo and having permitted a comprehensive change in circumstances to occur, the Bank must bear the consequences of its refusal to post a bond—denial of its Petition.

Granting certiorari and reversing the unstayed Confirmation Order years after substantial consummation would eliminate the compelling and well-settled doctrine of equitable mootness from bankruptcy jurisprudence, thereby causing the significant economic harm described

---

[8] In making these capital contributions, many of the Investors have foregone significant alternative investment opportunities. *See Appellee's Memorandum In Support Of Motion To Dismiss*, February 5, 1996 at Ex. B. These opportunities cannot be recreated if the Confirmation Order is reversed. For example, some Investors have irretrievably lost the opportunity to engage in a tax free exchange regarding a completed sale of other property. Those Investors will suffer irreparable harm if the Confirmation Order is now reversed, because they have used up losses which could have been used to offset the gain resulting from foreclosure on the Property.

by Judge Easterbrook in *UNR*, and drastically curtailing rehabilitation under Chapter 11. *See NLRB v. Bildisco and Bildisco*, 465 U.S. 513, 527-529 (1984) (policy of Chapter 11 is to permit successful rehabilitation of debtors and to avoid liquidation with attendant loss of jobs and possible misuse of economic resources). If this Court wishes to consider the continued survival of the new value corollary, it should await a case where the petitioner has preserved the status quo. This is not such a case. Certiorari should, therefore, be denied.

B. By failing to appeal the bankruptcy court's order denying the Bank's motion to terminate the Debtor's exclusive right to file a plan, the Bank waived its right to raise exclusivity.

An essential element of the Petition is the contention that the Debtor's statutory exclusive right to file a plan during the first 120 days of the Chapter 11 case constituted "property" which the Debtor's limited partners retained "on account of" their prior equity interests within the meaning of 11 U.S.C. § 1129(b)(2)(B)(ii). For example, in the "Question Presented" Section of the Petition, the Bank asks,

> [w]hether the Bankruptcy Code authorizes a judge to confirm a Chapter 11 plan of reorganization that grants pre-bankruptcy equity owners of a debtor an *exclusive opportunity* to retain or purchase an ownership interest in the reorganized debtor . . .

Petition at i (emphasis added). Thereafter, the Bank argues that, "the exclusive right to retain an equity interest in a business enterprise is 'property' within the meaning of 11 U.S.C. § 1129(b)(2)(B)(ii) . . ." Petition at 9. The Bank has waived its right to complain of exclu-

sivity. Consequently, this is not an appropriate case for considering the issue posed by the Bank's Petition.

A Chapter 11 debtor's exclusive right to file a plan is conferred by 11 U.S.C. § 1121(b) of the Code. That right is not perpetual; it exists only for the first 120 days of a Chapter 11 case and, even during that period, is subject to reduction upon request by a creditor such as the Bank. 11 U.S.C. §§ 1121(b), 1121(d). The obvious remedy for the wrong perceived by the Bank—inability to solicit bids for Reorganized LaSalle's equity through a competing plan of reorganization—was to request termination of the Debtor's exclusive period.

The Bank did move in the bankruptcy court for an order terminating the Debtor's exclusivity period. Simultaneously, the Bank sought authority to file its own plan. The Bank's plan was a plan of liquidation, which (a) was less favorable to unsecured creditors than the Debtor's Plan, (b) violated 11 U.S.C. §1129(a)(7) by failing to pay $7.7 million of allowed unsecured claims held by the Debtor's general partner and an affiliate, and (c) provided no infusion of new capital. The bankruptcy court entered an order denying the Bank's motion. BAI R. 104. **The Bank did not (a) appeal the bankruptcy court's order, (b) raise the denial of its motion as an issue on appeal or (c) designate its motion to terminate the Debtor's exclusive period as part of the record on appeal below.** By failing to do so, the Bank waived any right to now argue that the Debtor's exclusive right to file a plan permitting its partners to contribute new capital constitutes "property" retained "on account of" their prior equity interests within the meaning of 11 U.S.C. § 1129(b)(2)(B)(ii). *In re Freeman*, 956 F.2d 252, 255 (11th Cir. 1992); *In re Pine Mountain*

Ltd., 80 B.R. 171, 173 (9th Cir. BAP 1987). As a result of that waiver, the question presented by the Bank's Petition is not properly before this Court.

C. The Plan does not violate the absolute priority rule.

By acquiring worthless "equity" in Reorganized LaSalle in exchange for contributing new value, Investors received no "property" which would have been available to satisfy creditors' claims. In return for $6.125 million of new value, Investors received only the ability to defer a $20 million tax liability that would have been triggered by the Bank's foreclosure of its mortgage on the Property. That ability is not "property" to which creditors could look for payment under the absolute priority rule, which rule requires that creditors be paid in full from a debtor's property before any interest in that property may be received or retained by equity holders. On the contrary by contributing new value, the Investors conferred a substantial windfall on the Bank, because of their desire to defer tax liability. The Plan simply does not cause the harm to the Bank's deficiency claim which the absolute priority rule was intended to prevent.

The absolute priority rule was a judicial creation which had its origins in the law of fraudulent transfers and equity receiverships, and was designed to ensure that reorganizations were "fair and equitable". *In the Matter of Snyder*, 967 F.2d 1126, 1128 n.1 (7th Cir. 1992). As the Seventh Circuit recently observed:

> the absolute priority rule was a judicial invention designed to preclude the practice in railroad reorganizations of 'squeezing out' intermediate

> unsecured creditors through collusion between secured creditors and stockholders (who were often the same people). *Northern P. Ry. Co. v. Boyd*, 228 U.S. 482, 57 L.Ed. 931, 33 S.Ct. 554 (1913). *See also* e.g. John D. Ayer, *Rethinking Absolute Priority After Ahlers*, 87 Mich.L.Rev. 963, 969-73 (1989) discussing the history of the absolute priority rule. This rule was thus devised primarily to deal with the situation of overlapping ownership and creditor interests.

In re Wabash Valley Power Association, 72 F.3d 1305, 1314 (7th Cir. 1995), *cert. denied*, 117 S.Ct. 389 (1996).

As used in subsection (f) of the first corporate reorganization statute (Section 77B of the Bankruptcy Act of 1898 June 7, 1934, 48 Stat. at L. 912, Chap. 424 (repealed)), the words "fair and equitable" were "words of art which, prior to the advent of § 77B had acquired a fixed meaning through judicial interpretation in the field of equity receivership reorganizations." *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 108, 115 (1939). That meaning was clear and simple: "to the extent of their debts, creditors are entitled to priority over stockholders against *all property* of an insolvent corporation." *Id.* (quoting *Kansas City Terminal R. Co. v. Central Union Trust Co.*, 271 U.S. 445, 455 (1926) (emphasis added); *see also*, *Group of Institutional Investors v. Chicago, M.StP.&Pac.R.R.* 318 U.S. 523, 565 (1943). (absolute priority rule is satisfied if "each security holder in the order of his priority receives *from that which is available for satisfaction of his claim*, the equitable equivalent of the right surrendered.") (emphasis added).

The words "fair and equitable" which appear in 11 U.S.C. § 1129(b) are identical to the words which appeared in its predecessors, Section 77B and Chapter X.

11 U.S.C. § 221 (1938) (repealed 1978). The meaning of those words in 11 U.S.C. § 1129(b) is identical to the meaning ascribed to them by Justice Douglas in *Case*. In interpreting the words "fair and equitable", in Section 77B, Justice Douglas employed the same well-settled rule of statutory construction that this Court should employ in interpreting those same words in Section 1129(b): "where words are employed in an act which at the time had a well known meaning in the law, they are used in that sense unless the context requires the contrary." *Case* at 115.

The Investors retain their valueless partnership interests in Reorganized LaSalle in exchange for contributing new value. Clearly, therefore, the Plan does not involve the type of harm to creditors which the absolute priority rule was designed to prevent. Unlike parties in *Northern P. Ry. Co. v. Boyd*, 228 U.S. 482 (1913), the Bank and the Investors are adversaries. The Plan is not the product of collusion between them. Unlike the plans in *Coltex* and *Bryson*, the Plan preserves the Bank's artificial deficiency in its entirety until that claim has been paid in full. Therefore, the Plan does not divert to the Investors any property of the Debtor in which the Bank had a legal or equitable claim as an unsecured creditor. Indeed, it is undisputed that the equity interests in Reorganized LaSalle are worthless in a balance sheet sense, even after Reorganized LaSalle has received all of the Investors' new capital. The "benefit" which the Investors receive is continued deferral of a tax liability which only they will suffer in the event of a foreclosure. The Bank has no legal or equitable claim to that benefit. See *Randall v. Loftsgaarden*, 478 U.S. 647, 665-66 (1986) (tax losses have no value apart from investors' status as partners and are not freely transferable).

Given the facts of this case, the Court in *Boyd* would have found no violation of the absolute priority rule.

D. Even if the absolute priority rule applies, this case does not present any of the hypothetical dangers upon which critics rely to question the survival of the new value corollary.

Assuming that the absolute priority rule applies to this case, and relying exclusively on secondary material, dissents and dicta, the Bank's Petition proffers two reasons why the question of the new value corollary's continued existence purportedly has sufficient practical import to warrant consideration by this Court: (1) absence of the corollary will make debtors more willing to negotiate consensual plans with creditors [Petition at 16-17]; and (2) in applying the corollary, bankruptcy judges might undervalue estate assets, thereby decreasing "the amount paid to creditors, while at the same time permitting the debtor's pre-bankruptcy equity holders to retain an ownership interest in the post-bankruptcy business at a bargain price." Petition at 16-18. Those concerns are chimerical. Neither of the foregoing circumstances exist in this case. Consequently, this case is not an appropriate one for considering the new value corollary's continued existence. Certiorari should, therefore, be denied.

The Bank does not claim that the bankruptcy court's recognition of the new value corollary made the Debtor unwilling to negotiate with the Bank over the terms of a reorganization plan. Nor does the Bank claim that the Debtor refused a request by the Bank either for a greater dividend or for more capital. In fact, the Bank's attempts to (a) lift the automatic stay, (b) have the case

dismissed or converted to a Chapter 7 liquidation and (c) to file a liquidating plan giving the Bank title to the Property and providing no new capital, demonstrate that the Bank's sole object throughout this case has been to foreclose its mortgage on the Property. As a result, it was the Bank, not the Debtor, which refused to negotiate on the terms of any consensual reorganization plan. The Bank does not even suggest that the Debtor used the new value corollary to impose on any of the creditors a worse deal than creditors would have received without that corollary. On the contrary, in conjunction with equity holders' desire to defer a substantial tax liability, the new value corollary produced a *windfall* for the Bank by forcing equity holders to make a substantial new capital contribution in exchange for an equity interest which had no value to creditors.[9]

Similarly, the record in this case provides no basis for the Bank's fear that bankruptcy judges will undervalue a debtor's property, thereby enabling equity holders to obtain a bargain at creditors' expense. On the contrary, the $55.8 million value which the bankruptcy court placed on the Property is within 2.8% of the $57.4 million value proposed by the Bank's appraiser. In addition, since the Plan preserves the Bank's unsecured claim in

---

[9] Unlike the academic critics cited in the Bank's Petition, Harvard Law School's Professor Elizabeth R. Warren presciently anticipated that factors extraneous to a debtor's assets, such as limited partners' desire to defer a potential tax liability that would accrue through a secured creditor's foreclosure of its mortgage, could force those limited partners to confer a windfall on creditors by *overpaying* for equity in a reorganized debtor. Warren, *A Theory of Absolute Priority, 1991 Annual Survey of American Law* at 21. This is precisely what happened in this case.

its entirety, and since the Investors (unlike the equity holders in *Coltex* and *Bryson*) can receive nothing until the Bank's unsecured claim is paid in full, the bankruptcy court's valuation of the Property has no impact on the Bank's ability to recover the full amount of its unsecured claim.

The Bank does not even suggest that the Investors received their equity in Reorganized LaSalle at a bargain price. On the contrary, the amount of new capital contributed by the Investors met and surpassed the requirements of the marketplace as evidenced by the GE Capital letter of intent. This independent corroboration from the market regarding the sufficiency and fairness of the Investor's new capital contribution satisfies the desire for market validation of new capital contributions expressed by Judge Restani in the *Coltex* and *Bryson Properties* cases. Furthermore, because the Plan permits no return whatsoever to Investors on account of their $6.125 million capital contribution until the Bank's secured claim and unsecured artificial deficiency claims have been paid in full, the equity in Reorganized LaSalle has *no value vis a vis* the proceeds that will be realized from a future sale or refinancing of the Property. App. at 135a, 139a. By retaining worthless interests in Reorganized LaSalle in exchange for their substantial contribution of new value, the Investors received *no property of Reorganized LaSalle*. Instead, Investors received only the ability to defer a $20 million tax liability that would have been triggered by a foreclosure. That deferral is not "property" of the Debtor to which the Bank could look to satisfy its artificial deficiency claim. *Kansas City Terminal R. Co. v. Central Union Trust Co.*, 271 U.S. 445, 453-454 (1926) (under absolute priority rule unsecured creditors are preferred

over stockholders against property belonging to debtor corporation). Consequently, it bears repeating that under the Plan, the Debtor's equity holders have received no benefit at creditors' expense. Rather, they have conferred a substantial windfall on the Bank solely because of their desire to defer a potential tax liability.[10]

It is noteworthy that neither the Bank nor any of its academic supporters has cited a single case involving a confirmed plan of reorganization, affirmed on appeal, where the new value corollary was used to inflict on creditors the harm which the Bank speculates may flow from that corollary. On the contrary, in cases such as *Coltex*, where it appears that equity holders did attempt to undervalue the bank's collateral and obtain a bargain at the expense of a bank's artificial deficiency claim, the

---

[10] Nowhere in its Petition has the Bank identified any economic harm which it suffered under the Plan. Nor has the Bank articulated a rational economic reason for opposing the Plan. On the contrary, as the holder of an artificial deficiency claim created solely by the operation of 11 U.S.C. § 1111(b)(1)(A), the Bank's opposition to the Plan is *antithetical* to the Bank's economic interest as an unsecured creditor. But for the new value corollary, the Bank's decision to vote its artificial deficiency claim against the Debtor's Plan would lead to conversion of the Debtor's case to a Chapter 7 liquidation, or to dismissal of the case. In either event, the Bank would foreclose on its non-recourse mortgage and have no deficiency claim. Thus, in a foreclosure, the Bank would forfeit the $19 million dividend which it is projected to receive under the Plan on account of its artificial $38.5 million unsecured deficiency claim. No rational *unsecured* creditor would vote to defeat a plan paying it a $19 million dividend so that it could receive nothing in a Chapter 7 liquidation. Consequently, the Bank's argument against the new value corollary can only be seen as a transparent back door attack upon the bankruptcy court's finding that the Plan's treatment of the Bank's *secured claim* is "fair and equitable."

confirmation order was reversed.[11] Similarly, in the vast majority of reported decisions discussing the new value corollary, courts decline to even reach the question of the corollary's survival because they find that the plan in question would not have satisfied the corollary in any event. *See e.g. Matter of Woodbrook Associates*, 19 F.3d 312 (7th Cir. 1994); *Matter of Snyder*, 967 F.2d 1126 (7th Cir. 1992). In other words, all of the empirical evidence demonstrates that courts have interpreted the new value corollary strictly, and have been vigilant in protecting the rights of creditors from the potential harms hypothesized by the Bank and by the corollary's academic critics. The Bank's fears that bankruptcy courts will fail to do so are fanciful, and there is no need for this Court's involvement.

In short, the Plan in this case simply does not present the hypothetical problem which caused critics of the new value corollary such as Judge Easterbrook in *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351 (7th Cir. 1990), and Professor Baird in *The Elements of Bankruptcy* (rev. ed. 1993) at 263, to speculate that equity holders will invoke the new value corollary only when they are gaining at creditors' expense. See *Absolute Priority* at 21 (investors in tax driven partnership may be willing to make new value contributions far exceeding those of a third party), and 44-45. Consequently, this case is not an appropriate vehicle for addressing the continued existence of the new value corollary.

---

[11] The confirmation order in *Coltex* was stayed pending appeal. Thus, the creditor's appeal in that case was not equitably moot.

II.

THERE IS NO SPLIT IN THE CIRCUITS REGARDING THE EXISTENCE OF THE NEW VALUE COROLLARY.

In addition to the Seventh Circuit in this case, the Ninth Circuit in *In re Bonner Mall Partnership*, 2 F.3d 899 (9th Cir. 1993) has explicitly held that the new value corollary survived enactment of the Bankruptcy Code. No Circuit Court of Appeals has held otherwise.[12] Citing the *Coltex* and *Bryson Properties* decisions from the Second and Fourth Circuits, the Bank asserts that the opinion of the panel majority in this case conflicts with the decisions of two other circuits. Petition at 11. There is no such conflict. Neither *Coltex* nor *Bryson Properties* denies the existence of the new value corollary. On the contrary, as the Bank candidly acknowledges, each of those decisions recognizes that there may be circumstances under which a debtor's equity holders may retain their interest in a reorganized entity in exchange for an infusion of new capital. Those circumstances are present in this case.

In *In re Bryson Properties, XVIII*, 961 F.2d 496 (4th Cir. 1991), Judge Restani of the United States Court of International Trade, sitting by designation, held that the debtor's plan could not be confirmed because the plan placed the undersecured creditor's deficiency claim in a separate class in violation of 11 U.S.C. § 1122.

---

[12] The portion of the Fifth Circuit's opinion in *In re Greystone III Joint Venture*, 995 F.2d 1274 (5th Cir. 1991) denying the existence of the new value corollary was withdrawn in light of this Court's decision in *Dewsnup v. Timm*, 502 U.S. 410 (1992). *See Greystone III* at 1284. An opinion which has been withdrawn has no precedential value. *Alsberg v. Robinson*, 68 F.3d 312, 315 (9th Cir. 1995).

Therefore, the court's subsequent discussion of the new value corollary is dictum. Even in that discussion, however, the court did not absolutely deny the continued existence of the new value corollary. Rather, the court observed that "even if some limited new value exception were viable under the bankruptcy code, it would not be so expansive as to apply *under the facts of this case*." *Id.* at 505 (emphasis added). Those facts were plan provisions allowing the debtor's equity holders the right (1) to return of their new capital *before* the undersecured creditor's recovery on it deficiency claim; (2) to "buy" the debtor's property without exposing it to the market or otherwise allowing any other party, including the objecting undersecured creditor, the opportunity to bid; and (3) to pay a 3.5 percent dividend in full satisfaction of the undersecured creditor's $3,329,288 deficiency while simultaneously paying unsecured trade claims in full. *Id.* at 499, 504-505.

In *Coltex Loop Central Three Partners, L.P. v. BT/SAP Pool C Associates*, No. 96-5140, slip op. (2d Cir. Feb. 19, 1998) Judge Restani, this time writing for a panel of the Second Circuit, again concluded that a debtor may be able to confirm a new value cramdown plan under certain circumstances:

> [w]here no other party seeks to file a plan or where the market for the property is adequately tested, old equity may be able to demonstrate that it can meet the requirements of 11 U.S.C. § 1129 and that, in essence, it receives nothing on account of its prior position.

Although the discussion leading up to this conclusion includes a lengthy quotation from Judge Kanne's dissent in this case, Judge Restani stops short of denying the existence of the new value corollary.

Notably, the facts of this case are materially different from the facts present in both *Bryson Properties* and *Coltex*. In each of those cases, the court was properly concerned that the proposed contributions of new capital had not been tested by the marketplace to determine whether those contributions were reasonably equivalent to the value of the interests to be retained by the old equity holders. The courts' concerns arose because each plan proposed to eliminate the undersecured creditor's deficiency claim in exchange for a small up front cash payment, thereby allowing equity holders to capture future appreciation in the reorganized debtor's asset that would otherwise been available to satisfy the eliminated deficiency claim. In this case, the Bank's deficiency claim is preserved, and the bankruptcy court had ample, objective evidence to support its finding that the interests which equity holders retained in Reorganized LaSalle were not purchased at a bargain price. Under the circumstances of this case, even Judge Restani would have confirmed the Debtor's Plan.

III.

THE STATUS OF THE NEW VALUE COROLLARY IS NO LONGER SUFFICIENTLY IMPORTANT TO REQUIRE DECISION BY THIS COURT.

The issue of the new value corollary's continued existence has arisen primarily in Chapter 11 cases filed by partnerships which own a single commercial real estate project.[13] By filing Chapter 11, such partnerships

---

[13] Prior to passage of the Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, family farmers also filed Chapter 11 cases in order to save their farms from bank foreclosures.

attempt to prevent a foreclosure sale of the partnership's property and elimination of equity interests, because those events trigger recapture of partnership losses which have been passed through to partners during prior tax years. 26 U.S.C. §§ 1001, 7701(g), 702. The partners are required to treat those recaptured losses as taxable income. Typically, the partners are left without funds from the partnership with which to pay the often sizeable tax on the resulting "phantom income".

In the 1986 Tax Reform Act, Congress amended the Internal Revenue Code to eliminate the ability of passive investors in single asset real estate partnerships to offset losses which they received as limited partners against wages and portfolio income. See Tax Reform Act of 1986, P.L. 99-514, Section 501; 26 U.S.C. § 469. As a result, partnerships, such as the former Debtor in this case, have now largely lost their utility as a method for passive investors to own commercial real estate. Consequently, real estate investment trusts, whose shares are publicly traded, have now largely supplanted limited partnerships as the principal vehicle for passive investors to own interests in commercial real estate, and sound economics, and not tax benefits, are now the primary motivations for investing in commercial real estate. Therefore, single asset real estate cases filed to defer tax liabilities are approaching extinction.

Congressional amendments to the Bankruptcy Code have also reduced the practical importance of the issue of the new value corollary's survival. As exemplified by cases such as *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988) the new value corollary often arose in Chapter 11 cases filed to prevent lenders from foreclosing on family farms. Congress responded to the plight of family farmers with legislation. 8 *Collier on Bankruptcy*, ¶1200.01[b] at 1200-2 (15th ed. rev. 1997). In 1986, Congress enacted the Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986 which added Chapter 12 to the Bankruptcy Code. Pub. L. 99-554. Unlike Chapter 11, the cramdown provision of Chapter 12, 11 U.S.C. 1225(b) does not require that a plan be "fair and equitable" in order to be confirmed over the objection of an unsecured creditor.

Thus, under a Chapter 12 plan, a family farmer may use future earnings to retain its property over the objection of an unsecured creditor which has not been paid in full. 8 *Collier on Bankruptcy*, ¶1200.01[2] at 1200-4 (15th ed. rev. 1997). As a result of Chapter 12, family farmers no longer need to file Chapter 11 cases in order to save their farms. Therefore, a case such as *Ahlers* is now unlikely to recur.

Because of the foregoing legislative changes, the issue which was important in 1994 when this Court granted certiorari in the *Bonner Mall* case has ceased to be so today.[14] In effect, the foregoing legislative changes which have occurred especially since the *Ahlers* decision, and even since *Bonner Mall*, have transformed cases such as this one into mere historical curiosities which no longer require this Court's attention.

---

[14] The continued existence of the new value corollary has certainly stimulated a steady stream of secondary literature. In light of the legislative and economic changes which have diminished the likelihood of future litigation over the existence of the new value corollary, this body of literature is now essentially obsolete.

The Bank's Petition attempts to paint a picture of heated controversy in district and bankruptcy courts over the continued existence of the new value corollary. Petition at 12-13. Even if such a picture was accurate five years ago at the time of the *Bonner Mall* decision, the picture is dramatically different today. In the words of the Bankruptcy Review Commission, which has recommended that Congress codify the new value corollary, "[a] recent trend among bankruptcy and district courts is an almost uniform recognition of the new value exception." Commission Report at 561. Based on the settled state of the law as it exists *today*, the Bank's Petition should be denied.

CONCLUSION

For the reasons set forth above, the Bank's Petition should be denied.

Respectfully submitted,

RICHARD M. BENDIX, JR.
Counsel of Record
MALCOLM M. GAYNOR
PAUL J. GAYNOR
SCHWARTZ, COOPER, GREENBERGER
& KRAUSS, CHARTERED
180 North LaSalle Street
Suite 2700
Chicago, Illinois 60601
(312) 346-1300

Attorneys for Respondent

March 1998